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SYARIKAT PENGELUAR AIR SUNGAI SELANGOR SDN BHD

v.

SYARIKAT BEKALAN AIR SELANGOR SDN BHD

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HIGH COURT MALAYA, KUALA LUMPUR
ANANTHAM KASINATHER J
[SUIT NO: D-22-NCC-398-2010]
21 FEBRUARY 2011

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CONTRACT: *Construction of terms of contract - Novation Agreement - Whether plaintiff could recover sums due and owing by defendant under s. 4.04(c) of Novation Agreement - Whether defendant could rely on s. 4.04(b) of agreement due to insufficient fund - Whether plaintiff waived contractual right - Whether plaintiff could amend the statement of claim to introduce a cause of action which accrued after date of original statement of claim*

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The plaintiff (SPLASH) and the defendant (SYABAS) together with the state government of Selangor had entered into a Novation Agreement dated 3 February 2005. The plaintiff had filed this claim pursuant to the defendant's failure to make payment to the plaintiff in accordance with s. 4.04(c) of the Novation Agreement (to be read with s. 4.04(a) and 4.04(b)) for the supply of treated water. The defendant relied on s. 4.04(b) of the Novation Agreement wherein it was alleged that as long as the defendant's fund was insufficient to make full payment to all its suppliers, including the plaintiff, the defendant was not in default to make full payment. This claim was filed by the plaintiff on 30 October 2009 and the statement of claim was amended on 3 December 2010 to include claims which arose from the default of the defendant in respect of invoices issued by the plaintiff subsequent to the filing of the original statement of claim. The plaintiff prayed for, *inter alia* (i) a declaration that on a true construction of s. 4.04(c) of the Novation Agreement, the plaintiff was entitled to recover the full amounts owed by the defendant to the plaintiff ('first relief') and (ii) an account of all payments due to the plaintiff in respect of invoices issued after the date of the writ herein and an order for payment of all such sums found to be due on the taking of such account ('second relief').

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Held (allowing plaintiff's claim with costs):

(1) The inclusion of s. 4.04(c) of the Novation Agreement and the inclusion of such words as "SPLASH'S right to receive full payment" and "to take all necessary action against SYABAS to recover full payment thereof" clearly represented an intention on the part of the parties to confer upon the plaintiff, the right of recovery of the unpaid balance following the receipt of payment under s. 4.04(a). Whether the defendant had sufficient funds was peculiarly within the knowledge of the defendant. Accordingly, the plaintiff was entitled to the first relief regardless of the defendant's ability to pay the sums in full. (para 7)

(2) The plaintiff was not precluded by the Clayton's Rule from applying the payments received by it from the defendant in satisfaction of the later invoices in point of time. In order for the plea of estoppel to have succeeded, there must have been evidence of some unequivocal act on the part of the plaintiff reflecting an agreement on its part to have waived its contractual rights. Evidence that the plaintiff had applied the defendant's earlier payments in a particular manner of its own accord could not result in the plaintiff being denied of its contractual rights. In other words, in the absence of evidence that the plaintiff's conduct was pursuant to a mutual understanding, the plea of estoppel failed. The plaintiff was entitled to amend its statement of claim to introduce a cause of action that accrued due after the date of its original statement of claim. As such, the plaintiff's second relief was allowed. (paras 10 & 17)

Case(s) referred to:

Amalgamated Investment & Property Co Ltd v. Texas Commerce International Bank Ltd [1982] 1 QB 84 ***(refd)***

Cory Brothers & Co v. Owners of the Turkish Steamship The 'Mecca' [1897] AC 286 ***(refd)***

Eshelby v. Federated European Bank, Limited [1932] 1 QB 254 ***(refd)***

Lettleman v. Hansel Properties Limited [1987] AC 189 ***(refd)***

Liff v. Peasley [1980] 1 WLR 781 ***(refd)***

Simetech (M) Sdn Bhd v. Yeoh Cheng Liam Construction Sdn Bhd [1992] 1 CLJ 509; [1992] 3 CLJ (Rep) 585 HC ***(not foll)***

Sio Koon Lin & Anor v. SB Mehra [1980] 1 LNS 135 FC ***(refd)***

The Great Eastern Life Assurance Co Ltd v. Indra Janardhana Menon [2005] 4 CLJ 717 FC ***(refd)***

Vax Appliances Limited v. Hoover Plc [1990] RPC 656 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 14, O. 18 r. 9, O. 20 rr. 3(1), 5(5)

For the plaintiff - Nahendran Navaratnam (Wong Wye Wah with him); M/s Kadir, Andri & Partners
For the defendant - Dato' Loh Siew Cheang (Abdullah Abdul Rahman & Fadzilah Pilus with him); M/s Cheang & Ariff

Reported by Kumitha Abdul Majid

JUDGMENT

Anantham Kasinather J:

Background Facts

[1] Enclosure 1 revolves around the interpretation of s. 4.01(c) of the Novation agreement dated 3 February 2005 between the State Government of Selangor, the plaintiff and the defendant. In the writ of summons, amended pursuant to the order of court of 13 April 2010, the plaintiff seeks *inter alia* the following orders:

i) A declaration that on a true construction of s. 4.04(c) of the Novation Agreement dated 3 February 2005 ('the Novation Agreement') between the State Government of Selangor, the plaintiff and the defendant, read together with ss. 4.04(a) and 4.04(b) of the Novation Agreement, the plaintiff is entitled receive payments in full and to take action against the defendant to recover the full amounts owing by the defendant to the plaintiff for the supply of treated water regardless of the defendant's ability to pay the plaintiff the sums in full ('first relief'); and

ii) An account of all payments due to the plaintiff in respect of invoices issued after the date of the writ herein and an order for payment of all such sums found to be due on the taking of such account. ('second relief')

[2] Although the first relief sought by the plaintiff requires the interpretation of s. 4.04(c) only, counsel representing both parties made reference to several other sections in the Novation Agreement and it is common ground that regard should be had to

these other sections in interpreting s. 4.04 (c). For this reason, I propose to set out the whole of ss. 4.03, 4.04 and 4.05 of the Novation Agreement:

Section 4.03 Payment Term

a) The payment terms of the Supply Charge and the Capacity Charge shall be as set out in the SSP 3 Privatisation Agreement; and

b) Notwithstanding any directions or instructions to the contrary by SYABAS, in the event that there is any outstanding amount of the Supply Charge or Capacity Charge due and owing from SYABAS to SPLASH, upon the receipt of any payments from SYABAS, SPLASH shall have the absolute direction in determining the appropriation of such payments towards the settlement of the outstanding amounts.

Section 4.04 Proportionate Payment

a) SYABAS hereby agrees and undertakes with SPLASH and the State government that in the event of SYABAS being unable to discharge its payment obligations to SPLASH and/or other Suppliers in full in respect of the supply of treated water and Capacity Charge, SYABAS shall divide the amount available for payment amongst SPLASH and the other Suppliers in proportion to the amount due and payable to them from SYABAS. SYABAS shall make such payment to SPLASH and the other Suppliers at the same time;

b) The provision in Section 4.04(a) shall not in anyway be construed as enabling SYABAS in making partial payment if there is sufficient funds to make full payment; and

c) The acceptance of partial payment by SPLASH pursuant to Section 4.04(a) shall be without prejudice to SPLASH's right to receive full payment and shall not operate as a waiver of its rights to take all necessary action against SYABAS to recover full payment thereof.

Section 4.05

To ensure that SYABAS makes payment in accordance with Section 4.04, SPLASH shall have the right at anytime it deems appropriate, to request an independent verification and confirmation from SYABAS auditors that payments have been made in accordance with Novation Agreement and to this end, SYABAS

A shall give the necessary consent, authorization or permission to its auditors to furnish SPLASH with such verification and confirmation and all reasonable costs chargeable by SYABAS auditors shall be borne by SPLASH.

B **[3]** Before I proceed to set out the respective submissions of counsel, I should mention that counsel for the defendant urged me to also consider the minutes of the meeting of 29 March 2004 (exh. D6 of encl. 18). Counsel contended that the minutes of this meeting represented a relevant background fact, which should be taken into consideration by the court when interpreting
C s. 4.04(c). Counsel for the plaintiff, on the other hand, urged the court to disregard the minutes because the meeting was attended by representatives of both sides to this litigation but the minutes had been prepared and signed only by the representatives of one
D party. I had in an earlier decision ruled that these minutes should be disregarded because there is no evidence that these minutes had been accepted as representing the true minutes of the meeting by all the attendees. Not surprisingly the accuracy of the minutes is disputed by the plaintiff and there is no contemporaneous
E documentary evidence to assist this court in determining which party's version of the minutes represents the true minutes. It is trite law that a court should only admit 'evidence of mutually known facts' in the interpretation of documents (see *Prenn v. Simmonds* 237 at 240 – p. a-b and 241 p. f-g).

F **[4] Submission Of Plaintiff On First Relief**

i) It is common ground that there are three suppliers of treated water to the defendant. Hence, the need for the presence of the proportionate payment clause in s. 4.04.

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ii) The words of cl. 4.04 are clear and unambiguous. SYABAS is required under cl. 4.04(a) to pro-rate payment equally between all three suppliers. This is an obligation and not an entitlement. Clause 4.04(b) makes it clear that if there are
H sufficient funds to make full payment to all suppliers, SYABAS may not pro-rate. Clause 4.04(c) makes it clear that 4.04(a) does not prejudice the plaintiff's right to receive full payment on any invoice.

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iii) The requirement to pro-rate does not excuse or delay payment. Such an interpretation would be contrary (1) to the credit period of 90 days found in cl. 4.1(b) and (c) of the Supplemental Agreement to the Privatisation Agreement dated 3 February 2005 and (2) to the clear words of cl. 4.04(c).

[5] Submission Of Defendant

i) The effect of the Proportionate Payment Clause is that so long as the defendant does not have sufficient funds to pay all three suppliers, including the plaintiff, it shall pay the suppliers from the available funds proportionately ie, proportionate to the amount owing to each supplier. In doing so, it is not in breach of its obligation to pay the suppliers.

ii) The proportionate payment clause does not absolve the defendant from having to make full payment at the end of the day. It only means that the defendant is not in default as long as the defendant's fund is insufficient to make full payment to all suppliers. This is made clear by s. 4.04(b) of the Novation Agreement.

iii) The defendant accepts that s. 4.04(c) serves to preserve the plaintiff's right to receive full payment and acceptance of partial payment does not constitute a waiver on its part to receive full payment. This provision, however, must be read purposively, according to counsel for the defendant, and when so read, the obligation to make full payment is conditional on there being sufficient funds to make full payment. According to counsel, any other construction renders the whole of s. 4.04 not to make commercial sense and renders s. 4.05 useless.

Decision Of The Court On First Relief

[6] I understand the submission of the counsel for the defendant to be as follows; first, that the plaintiff cannot pursue a claim pursuant to a s. 4.04(c) without first requesting for an independent verification and confirmation from the defendant's auditors, that payment had been made in accordance with the Novation agreement. Secondly, if the independent verification should confirm that the payments made by the defendant were in accordance with s. 4.04(a), then, any claim by the plaintiff pursuant to s. 4.04(c) would be postponed until such time as the defendant is in a position to pay the plaintiff, bearing in mind that its obligation is to pay all three suppliers equally.

[7] I reject the submission of counsel for the defendant and hold that there is no provision barring relief to the plaintiff under s. 4.05 until the defendant is in receipt of sufficient funds. I opine to this effect for the following reasons:

a) First, if the intention of the parties to the Novation agreement was to subject the plaintiff's right to institute recovery proceedings under s. 4.04(c) to be conditional on compliance with s. 4.05, then, there was no need to incorporate s. 4.04(c) into the agreement. Section 4.05 when read together with s. 4.04(a) and (b) to the exclusion of s. 4.04(c), would support the submission of counsel for the defendant. However, in my opinion, the inclusion of sub sec. (c) and the inclusion of such words as 'SPLASH's right to receive full payment' and 'to take all necessary action against SYABAS to recover full payment thereof' in s. 4.04(c) clearly represent an intention on the part of the parties to confer upon the plaintiff, the right of recovery of the unpaid balance following the receipt of payment under s. 4.04(a). Secondly, the submission of counsel for the defendant that there is no obligation to pay until the defendant has sufficient funds, carried to its logical conclusion implies that the plaintiff will be without a remedy to recover the unpaid balance so long as the defendant has insufficient funds. This, notwithstanding, that the defendant is obliged to pay within 90 days pursuant to cl. 4.1(b) and (c) of the Supplemental Agreement to the Privatization Agreement dated 3 February 2005. Thirdly, if the defendant's obligation to pay does no arise until it is in receipt of sufficient funds, when does the cause of action to recover the balance accrued due having regard to the concession made by counsel for the defendant, in his submission that the defendant will have to pay the balance at the end of the day? In this respect, it must be borne in mind that whether the defendant has sufficient funds is peculiarly within the knowledge of the defendant unless the plaintiff invokes s. 4.05 and, in my opinion, s. 4.05 operates in tandem with s. 4.04(b) and not 4.04(c). Fourthly, in my judgment, the rationale for the existence of s. 4.04(a) is that failure to pay within 90 days does not result in the defendant being in default, for the purposes of the Novation Agreement. The plaintiff, in that event, can either invoke s. 4.05 and seek to recover a bigger payment provided the independent verification supports the plaintiff's allegation that

the defendant did not pro-rate payment equally between all three suppliers. The second option is to institute recovery proceedings under s. 4.04(c), which is what the plaintiff has undertaken in this case. To the extent that the plaintiff has invoked s. 4.04(c) and not s. 4.05, the plaintiff cannot seek to enforce any of its rights under the Novation Agreement premised on a breach of the Novation Agreement.

Accordingly, the plaintiff is entitled to the first relief.

Second Relief

[8] The writ of summons in this case was filed on 30 October 2009. The plaintiff amended its statement of claim on 30 April 2010 and again on 3 December 2010. The purpose behind the amendments was to enable the plaintiff to include claims arising from the default of the defendant in respect of invoices issued by the plaintiff subsequent to the filing of the original statement of claim. The defendant made payments subsequent to the issuance of the writ of summons. The payments made by the defendant are sufficient to satisfy the plaintiff's claim in full excluding invoices issued after the date of the original statement of claim. The plaintiff had applied payments received from the defendant prior to the issuance of the writ, in satisfaction of invoices issued earliest in point of time. However, payments received from the defendant after the issuance of the writ were applied by the plaintiff in satisfaction of invoices issued subsequent to the amendment, so as to render the earlier invoices forming the subject matter of its original claim to be still outstanding. As a result of this action of the plaintiff, the defendant continues to be liable on the earlier invoices together with interest.

[9] The conduct of the plaintiff as set out above has given rise to two important issues. The first issue is whether the plaintiff is entitled to apply the payments received subsequent to the issuance of the writ, in satisfaction of the later invoices? The submission of counsel for the defendant is that the plaintiff is obliged following Clayton's Rule, to credit the payments in satisfaction of the earlier invoices. The significance of this submission is that, when so applied, the plaintiff's claim in the original statement of claim would have been extinguished by the payments made by the defendant subsequent to the date of the original statement of claim. This

would also mean that the plaintiff's amended claim is now for invoices issued subsequent to the date of the original statement of claim. This, according to counsel for the defendant, is not possible because of the second issue. The second issue being that the plaintiff can only recover in an action for default in respect of invoices issued prior to the date of the original statement of claim. The case of *Eshelby v. Federated European Bank* was cited as authority for the proposition that a plaintiff cannot recover in respect of a default that accrued due after the date of the original statement of claim.

In my judgment, the answer to the first issue lies in the pronouncements of Lord Macnaghten in the House of Lords case of *Cory Brothers & Co v. Owners of the Turkish Steamship The 'Mecca'* [1897] AC 286. His Lordship with reference to the Clayton's Rule adopted as correct the pronouncements of Sir George Jessel M.R in *Hallett*'s Case to the following effect:

> "it is a very convenient rule," said the Master of the Rolls, "and I have nothing to say against it unless there is evidence either of agreement to the contrary or of circumstances from which a contrary intention must be presumed, and then of course that which is a mere presumption of law gives way to those other consideration." "Clayton's Case" (1), observed Baggally LJ "was decided upon the principle that in the absence of any expressed intention to the contrary or of special circumstances from which such an intertion could be applied, the appropriation of drawings out to the payments in, as adopted in that case, represented what must be presumed to have been the intention of the parties concerned; and so viewed the decision is quite consistent with the like presumption being rebutted or modified in another case in which the circumstances were such as to negative any intention to make such an appropriation of the drawings out to the payments in" (pp. 295, 296)

[10] Based on the decision of the House of Lords, I agree with counsel for the plaintiff that Clayton's Rule is only a presumption of law that can be rebutted by agreement to the contrary and s. 4.03(b) of the Novation Agreement represents such an agreement, to the contrary, enabling the plaintiff to apply payments received from the defendant in its absolute discretion. Accordingly, in my judgment, the plaintiff is not precluded by the Clayton's Rule from applying the payments received by it from the defendant in satisfaction of the later invoices in point of time. It

was then urged upon me by counsel for the defendant, that, in any event, the plaintiff is estopped, in law, from applying its payments in this manner due to its earlier conduct. The case of *Amalgamated Investment & Property Co. Ltd v. Texas Commerce International Bank Ltd* [1982] 1 QB 84 was cited to me in support of this proposition (see pp. 119, 120, 121). With respect, there is no merit in this submission. In my judgment, for the plea of estoppels to succeed, there must be evidence of some unequivocal act on the part of the plaintiff reflecting an agreement on its part to waive its contractual rights contained in s. 4.03 of the Novation Agreement. Evidence that the plaintiff did apply the defendant's earlier payments in a particular manner of its own accord cannot result in the plaintiff being denied its contractual rights. In other words, in the absence of evidence that the plaintiff's conduct was pursuant to a mutual understanding, the plea of estoppels must fail.

[11] This still leaves the issue of whether the plaintiff can pursue the claim contained in its amended statement of claim. Counsel for the defendant relied on the cases of *Simetech (M) Sdn Bhd v. Yeoh Cheng Liam Construction Sdn Bhd* [1992] 1 CLJ 509; [1992] 3 CLJ (Rep) 585, *Eshelby v. Federated European Bank, Limited* [1932] 1 QB 254, *The Great Eastern Life Assurance Co. Ltd v. Indra Janardhana Menon* [2005] 4 CLJ 717 and *Sio Koon Lin & Anor v. SB Mehra* [1980] 1 LNS 135 as authority for the proposition that an amended claim based on a cause of action which accrued due after the filing of the original statement of claim, cannot succeed.

[12] In my judgment, none of the cases cited by counsel for the defendant are authority for the proposition contended for by counsel for the defendant based on the current law. I opine to this effect based on the pronouncements of Justice Mummery J in the case of *Vax Appliances Limited v. Hoover Plc* [1990] RPC 656. His Lordship had this to say concerning amendments allowing for the introduction of new causes of action and the effect of the new rules regulating amendments on the decision of the court in *Eshelby* case:

> I do not find in the rules or in the cases any absolute rule against granting leave to amend to introduce a new cause of action which has arisen since the date of the writ or the relevant pleading. This is not a case like *Roban Jig & Tool* where the plaintiff had no cause of action at all at the date of the writ and the plaintiff had

A to rely on a title to copyright which he had acquired after the writ was issued; in that type of case the writ is incurably bad. It is not capable of being made good by amendment, since it is not a case of adding or substituting a new cause of action by amendment. There was no cause of action to add or to be the subject of substitution. In this case the Defendant did have a cause of action at the date of the service of the ... The cause of action was for the revocation of the patent. What the Defendants ought to do is to add an alternative claim for a declaration of non-infringement, which the Court can grant pursuant to its statutory powers under section 71 of the Patents Act 1977. Nor is this a case like *Eshelby*, where the amendment had to be made to the writ which, by reason of the application of the 'relation back' doctrine, meant that the writ would pre-date the cause of action. Since *Eshelby*, Lord Brandon's comments in the cases which I have mentioned make it clear that the addition of a new cause of action does not relate back to the writ or pleading in question; it dates only from the time the amendment is made. It is also clear from the provisions of Order 18, rule 19, which are in a different form from the equivalent provisions which were in force at the time when the *Eshelby* case was decided, that there is no power to include in pleading matters which have arisen since the date of the pleading.

[13] His Lordship also opined that the rationale for refusing amendments seeking to introduce a cause of action which accrued due after the date of the original statement of claim because of the theory of 'relation back' is no longer good law since the new rules permit this. His Lordship citing LJ Brandon's decision in *Liff v. Peasley* [1980] 1 WLR 781 at 803 opined that, henceforth, amendments allowing a cause of action after the date of the original statement of claim must necessarily take effect from the date of the amendment. The passage of LJ Brandon relied upon by His Lordship reads as follows:

> there is, in my view, a high degree of artificiality and unreality about the 'relation back' theory. There is no reason to a coral general proposition that an amendment of a writ or a pleading relates back to the original date of the document amended as stated by Lord Callin Mr in *Sneade v. Wotheroten Barytes and Lead Mining Company* [1904] 1 KB 295, 297. This seems to me to be entirely sensible proposition so long as the amended concern, does not involved the addition of a new party, either as Plaintiff or Defendant, or the raising of the new cause of action, but involves

> only the modification, by edition, delusion, or substitution or please or averments made between existing parties in respect of a cause or causes or action already raised. Where, however, the amendment concern involved the edition of a new party or the raising of the cause of action, it appears to me to be unrealistic and contrary to the commence sense of the matter to threat it as relating back in the same way.

[14] His Lordship also adopted as correct another passage in the speech of Lord Brandon in *Lettleman v. Hansel Properties Limited* [1987] AC 189 at 210 where Lord Brandon with reference to the pronouncements cited above said that 'an amendment with introduces a new cause of action only dates from the date of the amendment and does not relate back to the date of the document which is amended'.

[15] In my judgment, the pronouncements of Justice Mummery and LJ Brandon warrant our courts adopting a new approach to amendments which result in the incorporation of a cause of action which accrued due after the date of the original statement of claim. The justification for our courts adopting the similar approach is that the reasoning behind the decision of Justice Mummery is equally applicable in our jurisdiction since the rules introduced by RHC 1980 include rules similar to those relied upon by Justice Mummery and LJ Brandon. The rules being O. 20 r. 5(5) and O. 18 r. 9.

[16] Now, it only leaves me to distinguish the cases relied upon by counsel for the defendant. I do not propose to deal with *Eshelby*'s case since it is a decision based on Order XXVIII r. 1 of the Rules of the Supreme Court which reads "the court or a judge may, at any stage of the proceedings, allow either party to alter or amend his endorsement or pleadings, in such manner and on such terms as may be just, and all such amendment shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties". The other rule which concerned the court in *Eshelby*'s case is r. 12 of the same order and its contents are not dissimilar to r. 1 (see pp. 258 and 259 of the decision of Swift J). The case of *Simetech* cited by counsel for the defendant needs to be distinguished since it is a decision post the 1980 Rules of the High Court. In my judgment, the case of *Simetech* should not be followed for two reasons. First,

A it is evident from the decision of Justice Lim Beng Choon (as he then was) that His Lordship considered himself to be bound by the decision of the Federal Court in *Sio Koon Lim*. This is evident from His Lordship's pronouncements at p. 594 of his judgment (para a to d). As His Lordship considered himself bound by the
B Federal Court decision, His Lordship declined to consider pronouncements in the two English cases cited to him although the two English cases dealt with the position under the new English Rules, similar to our new rules (see p. 593 of His Lordship's decision). Secondly, and more importantly, His Lordship
C overlooked that the Federal Court case of *Sio Koon Lim* is a case decided under RHC 1957. In other words, His Lordship should have determined the rights of the parties in the case before him applying O. 20 r. 5(5) and O. 18 r. 9 of RHC 1980 and not have followed *Sio Koon Lim*. I am fortified in coming to the conclusion
D that His Lordship did not consider O. 20 r. 5(5) and O. 18 r. 9 by the report of His Lordship's judgment in the Current Law Journal (Rep) wherein references are only made to His Lordship having considered O. 14 and O. 20 r. 3(1) of the RHC 1980 (see p. 586). Since the remaining cases cited by counsel for the
E defendant do not relate to an application by the court of either O. 20 r. 5(5) or O. 18 r. 9, I do not propose to deal with these cases.

[17] Accordingly, in my judgment, the plaintiff is entitled to amend
F its statement of claim to introduce a cause of action which accrued due after the date of its original statement of claim and for this reason, I allow the plaintiff's claim for the second relief.

Orders Of Court

G i) I hereby declare that on a true construction of s. 4.04(c) of the Novation Agreement dated 3 February 2005 between the State Government of Selangor, the plaintiff and the defendant, read together with ss. 4.04(a) and 4.04(b) of the Novation Agreement, the plaintiff is entitled to receive payments in full
H and to take action against the defendant to recover the full amounts owing by the defendant to the plaintiff for the supply of treated water regardless of the defendant's ability to pay the plaintiff the sums in full;

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ii) I hereby order that an account of all payments due to the plaintiff in respect of invoices issued after the date of the writ herein be taken before the Deputy Registrar of the New Commercial Court and order that the defendant do pay the plaintiff all such sums found to be due on the taking of such account.

iii) I order the defendant to pay lump sum costs of RM30,000 in respect of encl. 1 and encl. 12 *in lieu* of taxation to the plaintiff.